Supreme Court, U.S.
FILED

03 711 NOV 6 2003

No. :_____

In the

Supreme Court of the United States

October Term, 2004

MICHAEL WEBB, DONYELL BECKWITH, WILLIE BRADLEY, MARIANO CAPPELANMENA, TIMOTHY COLLIER, STEVEN CORBETT, RENE ELLIS, LEON HARDY, TOMMY JACKSON, JR., JEFFREY McNEIL, BRIAN MORGAN, JIMMY RAMOS, SHAKA REYNOLDS, ERIC SMITH, ANGEL VALENTINE, JAMES WALLS, EDWARD WALSH, SAM WATERS, RICHARD WEATHERLY, HARRY WILLIAMS, RODNEY WRIGHT, HERBERT BURGESS, MANNY CABASSA, ANDRES CHAPARRO, SHAWN CORNWALL, GERALD DeROSSE, MICHAEL McKENZIE, DANIEL MORALES,THOMAS MURPHY, CORNELIUS RICKS, and GEORGE SIMMONS, GREGORY BARNES, DON JUAN BRITT, HUNTER DUPREE, WILLIAM MINGUES, TIMOTHY SMITH, a/k/a CORY YOUNG and LANCE SULLIVAN,

Petitioners-Appellants,

-against-

(CAPTION CONTINUED ON INSIDE COVER)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PAUL E. KERSON
JOHN F. DUANE
KOPPELL, LEAVITT, KERSON,
LEFFLER & DUANE, LLP
Attorneys for Petitioners-Appellants
99 Park Avenue - Suite 800
New York, New York 10016
(212) 973-9339

DICK BAILEY SERVICE (212) 608-7666 (718) 522-4363 (516) 222-2470 (914) 682-0848 Fax: (718) 522-4024
1-800-531-2028

73 pp

GLENN S. GOORD, Individually and as Commissioner of the New York State Dept. of Correctional Services; DR. LESTER WRIGHT, Individually and as Associate Commissioner for Health Services of the New York State Dept. of Correctional Services; FRANK HEADLEY, Individually and as Superintendent of the Arthur Kill Correctional Facility; DANIEL SENKOWSKI, Individually and as Superintendent of the Clinton Correctional Facility; CHARLES GREINER, Individually and as Superintendent of the Sing Sing Correctional Facility; EARL COUTURE, Individually and as Superintendent of the Gouverneur Correctional Facility; MICHAEL McGINNES, Individually and as Superintendent of the Southport Correctional Facility; EDWARD REYNOLDS, Individually and as Superintendent of the Mohawk Correctional Facility; ROBERT KUHLMANN, Individually and as Superintendent of the Sullivan Correctional Facility; MELVIN L. HOLLINS, Individually and as Superintendent of the Oneida Correctional Facility; MR. CONNELLY, as Deputy of Security of Sing Sing Correctional Facility; MR. GEBBER, as Correctional Counsel of Sing Sing Correctional Facility; PETER LACY, Individually and as Superintendent of the Bare Hill Correctional Facility; BRIAN MALONE, as Inspector General of DOCS; SGT. BERIOS; NETTI CONDELL, Correction Counselor, JOSEPH McCOY, Individually and as Superintendent of the Cayuga Correctional Facility; SGT. HUGGINS; SGT. BLANKENSHIP;OFFICER DANIEL CRUMB; OFFICER PUTNAM; OFFICER JOHN DOE KELLY, OFFICER WEIN; OFFICER FOSTER; LT. CALDWELL; SGT. BISHOP; DEPUTY SUPERINTENDENT CONNELLY; LT. SHERMAN, LT. FARREL; SGT. VAUGHAN;CORRECTION OFFICER HOOD; CHARLES DUFRAIN, Individually and as Superintendent

of the Franklin Correctional Facility; MR. SWEENEY, as Deputy Superintendent of Security at the Gouverneur Correctional Facility; CAPTAIN RABSATT; SGT. BOURGAL; CORRECTION OFFICER R. NAGLE; CORRECTION OFFICER T. LINK;

Defendants-Appellees.

QUESTIONS PRESENTED

A. Should this Court permit the Circuit Courts of Appeals to be divided on the question of the validity of multiple-prisoner complaints under the Prison Litigation Reform Act (PLRA), 18 U.S.C. Section 3626?

B. Should this Court permit the U.S. Court of Appeals, Second Circuit to rule contrary to this Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002)?

TABLE OF CONTENTS

Pages

Questions Presented i

Table of Authorities iv

Opinions Below 3

Jurisdiction 4

Statutes Involved 4

Statement of the Case 5

Basis for Federal Jurisdiction in the District Court 8

Reasons for Granting Writ 8

Conclusion 13

Appendix A - Decision and Order of the United States District Court for the Southern District of New York, dated Sept. 29, 2000, 197 F.R.D. 98 (S.D.N.Y. 2000) 1a

Appendix B - Decision and Order of the United States District Court for the Southern District of New York, dated March 28, 2002, 192 F. Supp. 2d 208 (S.D.N.Y. 2002) 18a

Appendix C - Order of the United States District Court for the Southern District of New York, dated August 6, 2002, unreported 27a

Appendix D - Decision of the United States Court of Appeals for the Second Circuit, dated August 13, 2003, 340 F. 3d 105 (2d Cir. 2002) 29a

Appendix E - Decision of the United States Court of Appeals for the Second Circuit, dated October 16, 2003, unreported 45a

Appendix F - The Prison Litigation Reform Act (PLRA), 18 U.S.C. Section 3626 ..... 47a

TABLE OF AUTHORITIES

Pages

Cases:

Belton v. Gebhart,
32 Del. Ch. 343, affd. 33 Del. Ch. 144 (1952) 10

Bolling v. Sharp,
347 U.S. 497 (1954) 10

Briggs v. Elliott,
98 F. Supp. 529 (E.D.S.C. 1951) 10
103 F. Supp. 920 (E.D.S.C. 1952) 10

Brown v. Board of Education,
98 F. Supp. 797 (D. Kans. 1951) 10

Brown v. Board of Education,
347 U.S. 483 (1954) 9

Davis v. County School Board,
103 F. Supp. 337 (E.D. Va. 1952) 10

Dougan v. Singletary,
129 F. 3d 1424 (11th Cir. 1997) 9

Farmer v. Brennan,
511 U.S. 825 (1994) 11

Gideon v. Wainwright,
372 U.S. 335 (1963) 6

Hallett v. Morgan,
287 F. 3d 1193 (9th Cir. 2002) 9

Hope v. Pelzer,
536 U.S. 730 (2002) 3,7,11,12,13
Hudson v. McMillian,
503 U.S. 1 (1992) 11

Inmates of Suffolk County Jail v. Rouse,
129 F. 3d 649 (1st Cir. 1997) 9

Mayweathers v. Newland,
258 F. 3d 930 (9th Cir. 2001) 9

Porter v. Nussle,
534 U.S. 516 (2002) 12

Statutes:

18 U.S.C. Section 3626 4,5,6,8
28 U.S.C. Section 1254 (1) 4
42 U.S.C. Section 1983 4,5,6,8,11

Court Rules:

U.S. Supreme Court Rule 10(a) 9

U.S. Supreme Court Rule 10(c) 12

In the
Supreme Court of the United States
October Term, 2004

MICHAEL WEBB, DONYELL BECKWITH, WILLIE BRADLEY, MARIANO CAPPELANMENA, TIMOTHY COLLIER, STEVEN CORBETT, RENE ELLIS, LEON HARDY, TOMMY JACKSON, JR., JEFFREY McNEIL, BRIAN MORGAN, JIMMY RAMOS, SHAKA REYNOLDS, ERIC SMITH, ANGEL VALENTINE, JAMES WALLS, EDWARD WALSH, SAM WATERS, RICHARD WEATHERLY, HARRY WILLIAMS, RODNEY WRIGHT, HERBERT BURGESS, MANNY CABASSA, ANDRES CHAPARRO, SHAWN CORNWALL, GERALD DeROSSE, MICHAEL McKENZIE, DANIEL MORALES,THOMAS MURPHY, CORNELIUS RICKS, and GEORGE SIMMONS, GREGORY BARNES, DON JUAN BRITT, HUNTER DUPREE, WILLIAM MINGUES, TIMOTHY SMITH, a/k/a CORY YOUNG and LANCE SULLIVAN,

Plaintiffs-Appellants,

-against-

GLENN S. GOORD, Individually and as Commissioner of the New York State Dept. of Correctional Services; DR. LESTER WRIGHT, Individually and as Associate Commissioner for Health Services of the New York State Dept. of Correctional Services; FRANK HEADLEY, Individually and as Superintendent of the Arthur Kill Correctional Facility; DANIEL SENKOWSKI, Individually and as Superintendent of the Clinton Correctional Facility; CHARLES GREINER, Individually and as Superintendent of the Sing Sing

Correctional Facility; EARL COUTURE, Individually and as Superintendent of theGouverneur Correctional Facility; MICHAEL McGINNES, Individually and as Superintendent of the Southport Correctional Facility; EDWARD REYNOLDS, Individually and as Superintendent of the Mohawk Correctional Facility; ROBERT KUHLMANN, Individually and as Superintendent of the Sullivan Correctional Facility; MELVIN L. HOLLINS, Individually and as Superintendent of the Oneida Correctional Facility; MR. CONNELLY, as Deputy of Security of Sing Sing Correctional Facility; MR. GEBBER, as Correctional Counsel of Sing Sing Correctional Facility; PETER LACY, Individually and as Superintendent of the Bare Hill Correctional Facility; BRIAN MALONE, as Inspector General of DOCS; SGT. BERIOS; NETTI CONDELL, Correction Counselor, JOSEPH McCOY, Individually and as Superintendent of the Cayuga Correctional Facility; SGT. HUGGINS; SGT. BLANKENSHIP;OFFICER DANIEL CRUMB; OFFICER PUTNAM; OFFICER JOHN DOE KELLY, OFFICER WEIN; OFFICER FOSTER; LT. CALDWELL; SGT. BISHOP; DEPUTY SUPERINTENDENT CONNELLY; LT. SHERMAN, LT. FARREL; SGT. VAUGHAN;CORRECTION OFFICER HOOD; CHARLES DUFRAIN, Individually and as Superintendent of the Franklin Correctional Facility; MR. SWEENEY, as Deputy Superintendent of Security at the Gouverneur Correctional Facility; CAPTAIN RABSATT; SGT. BOURGAL; CORRECTION OFFICER R. NAGLE; CORRECTION OFFICER T. LINK;

Defendants-Appellees.

OPINIONS BELOW

The U.S. District Court for the Southern District of New York dismissed part of the Complaint of 37 badly injured New York State prisoners-petitioners on or about September 29, 2000. See 197 F.R.D. 98 (S.D.N.Y. 2000), reproduced as Appendix A.

The U.S. District Court for the Southern District of New York dismissed the balance of the 37 badly injured New York State prisoners-petitioners' Complaint on or about March 28, 2002. See 192 F. Supp. 2d 208 (S.D.N.Y. 2002), reproduced as Appendix B.

Thereafter, on June 27, 2002, while this matter was pending in the U.S. Court of Appeals, Second Circuit, this Court decided *Hope v. Pelzer*, 536 U.S. 730 (2002), which governs this case.

Thus, a Motion for reconsideration of the dismissal in light of this Court's decision in *Hope v. Pelzer*, was made to the United States District Court for the Southern District of New York. This Motion for reconsideration was denied in an unreported Order of the District Court dated August 6, 2002, reproduced as Appendix C.

The U.S. Court of Appeals, Second Circuit, sustained the District Court's decisions. See 340 F. 3d 105 (2d Cir. 2003), reproduced as Appendix D.

The 37 badly injured New York State prisoners-petitioners filed a Petition for a Panel Rehearing and for a Hearing En Banc in the U.S. Court of Appeals, Second Circuit.

The U.S. Court of Appeals, Second Circuit denied the Petition for a Panel Rehearing and the Petition for a Hearing En Banc in an unreported decision dated October 16, 2003, reproduced as Appendix E.

JURISDICTION

The jurisdiction of this Court to review the determination of the United States Court of Appeals for the Second Circuit in conferred by 28 U.S.C. Section 1254 (1).

The United States Court of Appeals for the Second Circuit filed its initial decision against the 37 badly injured New York State prisoners-petitioners on August 13, 2003. The United States Court of Appeals for the Second Circuit filed its decision denying the 37 badly injured New York State prisoners-petitioners' Petition for a Hearing EnBanc and a Panel Rehearing on October 16, 2003.

STATUTES INVOLVED

Prison Litigation Reform Act (PLRA) 18 U.S.C. Section 3626, reproduced as Appendix F.

The United States Constitution, 8th Amendment -

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Federal Civil Rights Acts, 42 U.S.C. Section 1983, Civil Action for Deprivation of Rights:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

Appellants are 37 badly injured New York State prisoners. Petitioners' counsel sought to join all 37 cases in an effort to show a pattern and practice of 8th Amendment violations by the Respondent state prison officials. Petitioners sought a Special Master for the New York State prison system pursuant to the Prison Litigation Reform Act, 18 U.S.C. Section 3626. Petitioners further sought relief for violation of their constitutional rights, their civil rights, and for their personal injuries, all pursuant to the Civil Rights Laws of the United States, 42 U.S.C. Section 1983, the 8th Amendment,

and the relevant state law claims.

Petitioners sustained the following injuries: seven stitches, blurred vision, back pain, kicked in the kidneys, 8 1/2" long scar on face, 10" long scar on the back, impaired vision in the right eye, swollen head, swollen lip, swollen forehead, bleeding eye, constant headaches, numbness of fingers, deep lacerations on the right side of the neck and throat, life-saving tracheotomy required, traumatic aneurism to the cartoid artery, deep cut on the left side of the head, loss of blood, staples on the side of the head, five stitches in the lower lip, 15 stitches in the left leg, blackouts, black eye, unlawful placement on a bread and water diet, starved and stripped of his clothes, fractured left arm, bruises to wrist, scraped face, bent thumb, surgical implant of a plate on the right side of his face due to severe beating, hair pulled out of the scalp, beating about the face and torso, difficulty breathing, abrasions to face, broken ribs, swollen jaw, 17 broken bones in the face, pepper gas sprayed causing asthma attack, vicious beating, punched in the back, legs, groin, arms and face, 43 stitches, 17 stitches, numbness to the head, 68 stitches on the face, scar 19" long on the back, two scars 7" long on the back, eyeballs pushed to the point of bursting, and 35 stitches.

These severe injuries happened in numerous different state prisons throughout the State of New York prison system.

Petitioners' counsel spent 19 years enforcing this Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), and was thus thoroughly familiar with the brutal and unconstitutional conditions in the New York State prison system. Petitioner's counsel thus gathered together evidence of the brutal injuries sustained by the 37 prisoner-petitioners and

combined them in one Complaint filed in the United States District Court for the Southern District of New York pursuant to the Prison Litigation Reform Act (PLRA), 18 U.S.C. Section 3626, the Civil Rights Laws of the United States, 42 U.S.C. Section 1983, the 8th Amendment, and the relevant state law claims.

Upon motion of the Respondents, the U.S. District Court for the Southern District of New York dismissed part of the Complaint on September 29, 2000. See 197 F.R.D. 98 (S.D.N.Y. 2000), reproduced herein as Appendix A.

Upon Respondents' further motion, the U.S. District Court for the Southern District of New York dismissed the entire Complaint on March 28, 2002. See 192 F. Supp. 2d 208 (S.D.N.Y. 2002), reproduced herein as Appendix B.

On June 27, 2002, this Court announced its decision in *Hope v. Pelzer*, 536 U.S. 730 (2002). In *Hope v. Pelzer*, this Court held that the Alabama state prison system could not handcuff inmates to hitching posts as punishments for infractions. This minimally cruel and unusual punishment was held to violate the 8th Amendment.

A careful reading of *Hope v. Pelzer* indicated that a Motion for reconsideration was appropriate in the U.S. District Court in the instant case given this Court's strong stand on 8th Amendment violations caused by state prison officials' negligence and gross negligence.

The U.S. District Court for the Southern District of New York denied the said Motion for reconsideration in an unreported Order dated August 6, 2002. The said Order is reproduced as Appendix C.

An appeal was taken to the U.S. Court of Appeals, Second Circuit. The U.S. Court of Appeals, Second Circuit, sustained the decisions of the U.S. District Court in a reported opinion at 340 F. 3d 105 (2d Cir. 2003). It is reproduced as Appendix D.

The 37 badly injured prisoners-petitioners moved for a Hearing En Banc and/or a Panel Rehearing in the U.S. Court of Appeals, Second Circuit. The U.S. Court of Appeals, Second Circuit, denied this Petition for a Hearing En Banc and/or for a Panel Rehearing in an unreported written decision dated October 16, 2003. See Appendix E.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

The basis for federal jurisdiction in the Court of first instance, the United States District Court for the Southern District of New York, was and is the Prison Litigation Reform Act (PLRA), 18 U.S.C. Section 3626, the Civil Rights Laws of the United States, 42 U.S.C. Section 1983, and the 8th Amendment to the United States Constitution.

REASONS FOR GRANTING THE WRIT

A. *The Circuit Courts of Appeals are divided on the question of the validity of multiple-prisoner complaints under the Prison Litigation Reform Act (PLRA), 18 U.S.C. Section 3626.*

In its opinion in this case, the U.S. Court of Appeals,

Second Circuit, held that 37 badly injured stated prisoners could not combine their efforts in one District Court Complaint for purposes of seeking reform of a brutal, unconstitutional state prison system. The Second Circuit held: "...we take pains to assert that we are not establishing the triumph of form over substance. Rather, our affirmance should stand for the proposition that *form matters* in our system of adjudication." See 340 F. 3d at 111. Emphasis supplied by Court.

The Ninth Circuit, First Circuit, and Eleventh Circuit all reached the opposite conclusion on this point. The Ninth, First and Eleventh Circuits all permitted multiple prisoner Complaints in a Prison Litigation Reform Act (PLRA) context. See *Mayweathers v. Newland*, 258 F. 3d 930 (9th Cir. 2001), *Hallett v. Morgan*, 287 F. 3d 1193 (9th Cir. 2002), *Inmates of Suffolk County Jail v. Rouse*, 129 F. 3d 649 (1st Cir. 1997), and *Dougan v. Singletary*, 129 F. 3d 1424 (11th Cir. 1997).

Thus, pursuant to this Court's Rule 10(a), certiorari should be granted because the Second Circuit herein has entered a decision that is in direct conflict with the decisions of the Ninth, First and Eleventh Circuits cited above.

Further, this Court must grant certiorari to reaffirm the principle of joinder of civil rights cases enunciated in *Brown v. Board of Education*, 347 U.S. 483 (1954):

> "These cases come to us from the states of Kansas, South Carolina, Virginia and Delaware. They are premised on different facts and different local conditions, but a common legal question justified their consideration together in this consolidated opinion." See 347 U.S. at 486.

Brown v. Board of Education, actually concerned 12 different plaintiffs who brought the same civil rights complaint concerning unlawful public school segregation in three different United States District Courts and one State Court. See *Brown v. Board of Education*, 98 F. Supp. 797 (D. Kans. 1951), *Briggs v. Elliott*, 98 F. Supp. 529 (E.D.S.C. 1951), 103 F. Supp. 920 (E.D.S.C. 1952), *Davis v. County School Board*, 103 F. Supp. 337 (E.D. Va. 1952), and *Belton v. Gebhart*, 32 Del. Ch. 343 (Del. Ch. 1952) affirmed 33 Del. Ch. 144 (Del. S. Ct. 1952).

In the instant case, all of the Respondents work for the New York State Department of Correctional Services (DOCS) and operate from their common headquarters in the New York State Capital, Albany, NY. Thus, one filing and the initial consolidation was the wisest use of judicial resources. To divide these 37 plaintiffs among the United States District Courts for the Southern District of New York, the Eastern District of New York, the Western District of New York, and the Northern District of New York, would have invited four contradictory rulings on common questions of law. It would also have been needlessly litigious given that the respondents are all DOCS employees.

If this Court allowed joinder of three Federal District Court cases from Kansas, South Carolina and Virginia with a Delaware State case, and a companion Washington, D.C. case, *Bolling v. Sharp, 3*47 U.S. 497 (1954), then this Court should certainly permit and encourage 37 badly injured state prisoners to combine their cases in order to secure system-wide relief under the 8th Amendment and the PLRA.

B. *This Court cannot permit the U.S. Court of Appeals,*

Second Circuit, to rule contrary to this Court's decision in Hope v. Pelzer, 536 U.S. 730 (2002).

The New York State prison system is nothing less than a blatant assault on the human condition violating the "dignity of man" forbidden to state prison officials by this Court in *Hope v. Pelzer*. See 536 U.S. at 737.

In *Hope v. Pelzer*, this Court held that state prison officials must be aware when their conduct violates "'clearly established statutory or constitutional rights of which a reasonable person would have known.'" See 536 U.S. at 741.

This Court went on to assert that state prison officials are duty-bound to be aware of this Court's 8th Amendment decisions and U.S. Court of Appeals 8th Amendment decisions for the Circuit encompassing the state where the particular state prison system is located.

In *Hudson v. McMillian*, 503 U.S. 1 (1992), this Court held that state correction officers, *and their supervisors*, are liable under the 8th Amendment and 42 U.S.C. Section 1983, when excessive physical force is used against a prisoner even though that prisoner does not suffer serious injury. In *Hudson v. McMillian*, this Court held: "to deny, as the dissent does, the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the 'concepts of dignity, civilized standards, humanity and decency' that animate the 8th Amendment.' See 503 U.S. at 11-12.

In *Farmer v. Brennan*, 511 U.S. 825 (1994), this Court held that prison officials are liable for harm inflicted upon a prisoner by other inmates where the said prison officials knew

of the substantial risk of serious harm and disregarded that risk by failing to take reasonable measures to abate it. Both the U.S. Court of Appeals and the District Court in the instant case ignored factual material which indicated that many of these 37 Petitioners had indeed exhausted their administrative remedies. No hearing was held on this point. Nevertheless, both Courts wrongfully invoked this Court's decision in *Porter v. Nussle*, 534 U.S. 516 (2002) to bar this case. The record is devoid of any valid documentary submission by the Respondents attesting to any failure to exhaust by the Petitioners.

The U.S. Court of Appeals, Second Circuit, found that Petitioners' "second amended complaint constitutes a catalog of violence and ill treatment toward the plaintiffs." See 340 F. 3d at 107.

Despite the fact that these shocking allegations were never denied by the Respondents, the U.S. Court of Appeals, Second Circuit failed, neglected and refused to follow the clear holding of this Court in *Hope v. Pelzer*:

> "The use of the hitching posts under these circumstances violates the 'basic concept underlying the Eighth Amendment (which) is nothing less than the dignity of man.'...this punitive treatment amounts to gratuitous infliction of 'wanton and unnecessary pain that our precedent clearly prohibits.'" See 536 U.S. at 738.

Thus, this Court must grant this Petition for a Writ of Certiorari pursuant to this Court's Rule 10(c). The Court of Appeals in this case "has decided an important federal question

in a way that conflicts with relevant decisions of this court" within the meaning of Rule 10(c). The decision of the U.S. Court of Appeals, Second Circuit herein is in direct conflict with this Court's decision in *Hope v. Pelzer*, cited above.

CONCLUSION

For all of the foregoing reasons, a Writ of Certiorari should be granted.

Respectfully Submitted,

PAUL E. KERSON
JOHN F. DUANE
Koppell, Leavitt, Kerson, Leffler & Duane LLP
Attorneys for Petitioners

Dated: October 30, 2003
New York, NY

197 F.R.D. 98
48 Fed.R.Serv.3d 600
(Cite as: 197 F.R.D. 98)

United States District Court,
S.D. New York.

Michael WEBB, et al., Plaintiffs,
v.
Glenn S. GOORD, et al., Defendants.

No. 99 CIV. 10394(VM).

Sept. 29, 2000.

Prison brought § 1983 action alleging that prison conditions in the State failed to comply with constitutional standards, and relying on each prisoner's unrelated incidents of assault by different corrections officers or other inmates occurring at thirteen distinct prison facilities during a period spanning over ten years. Prisoners moved to consolidate action with six others brought by some of the prisoners in other districts, and defendant prison officials moved to dismiss. The District Court, Marrero, J., held that: (1) consolidation was not warranted, and (2) complaint failed to state a claim.

Motion to consolidate denied and motion to dismiss granted with leave to replead.

West Headnotes

[1] Federal Civil Procedure 8.1
170Ak8.1

The convenience and efficiency benefits of consolidation of actions cannot be pursued at the sacrifice of fairness to all the parties. Fed.Rules Civ.Proc.Rule 42(a), 28 U.S.C.A.

[2] Federal Civil Procedure 8.1
170Ak8.1

Parties seeking consolidation of actions bear the burden to demonstrate that the actions in question share common issues of law or fact. Fed.Rules Civ.Proc.Rule 42(a), 28 U.S.C.A.

[3] Federal Civil Procedure 8.1
170Ak8.1

Prisoners' § 1983 action grounded on alleged failure of prison officials to protect prisoners adequately from assaults by corrections officers and other inmates and of denial of adequate medical treatment would not be consolidated with six other actions brought by some of the plaintiff prisoners in other districts, despite similarity among the type of incidents prisoners sought to combine, where, inter alia, the other cases entailed different events occurring at different times and at different facilities and involving different defendants and different conduct. 42 U.S.C.A. § 1983; Fed.Rule Civ.Proc.Rule 42(a), 28 U.S.C.A.

[4] Federal Civil Procedure 657.5(3)
170Ak657.5(3)

Special leniency to be accorded in reviewing the sufficiency of claims brought by incarcerated pro se litigants alleging civil rights violations in not intended as a license to sustain any complaint that contains nothing more than descriptions of broad generalizations, shocking conditions, sweeping castigations and unfounded conclusions, but no specific facts from which an actual deprivation of rights may be inferred.

[5] Civil Rights 235(7)
78k235(7)

[5] Constitutional Law 72
92k72

Prisoners' § 1983 complaint, citing various personal injuries, asserting that the prisoners were "actual and representative victims of the Reign of Terror that characterizes the current administration of the New York State prison system by the defendants official," and seeking to enjoin defendants' unlawful acts and to appoint a special Master to oversee the administrations of the State's prison system, failed to assert sufficient factual allegations to state the elements of the wrongful deprivations of civil rights prisoners claimed, and the requested intrusion into the domain of State functions and executive a uthority, e xtraordinary u nder a ny c ircumstances, would on the present record represent an arrogation of judicial power. 42 U.S.C.A § 1983; Fed.Rule Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[6] Prisons 17(1)
310k17(1)

Prisoners and other persons under the control and dependence of the State have rights to be reasonably protected from physical harm and are owed a duty to be treated humanely.

[7] Injunction 118(1)
310k17(1)

[7] Prison 17(1)
310k17(1)

Prisoners failed to state sufficient grounds under the Prison Litigation Reform Act (PLRA) for requested injunctive relief and appointment of special master to oversee state prison system, where prisoners' contention that prison conditions in the state failed to comply with constitutional standards relied on each of the plaintiffs' unrelated incidents of assault by different corrections officers or other inmates occurring at thirteen distinct prison facilities during a period spanning over ten years. 18 U.S.C.A. § 3626(a)(1)(A).

[8] Conspiracy 18
91k18

Prisoners' allegations that the "Reign of Terror" they described as pervading the entire state prison system was a product of an extensive conspiracy among defendant prison officials to commit cruel and unusual punishment in violation of the Eighth Amendment and the civil rights of the state's prison population failed to state a claim where prisoners offered no factual basis of any agreement, action in concert or overt

conduct by any of the defendants that fell within the scope of conspiracy to deprive plaintiffs of their civil rights, and where there was no indication of personal involvement by some defendants in the alleged constitutional violations. U.S.C.A Const.Amend. 8; 42 U.S.C.A § 1983.

[9] Sentencing and Punishment 1532
350Hk 1532

[9] Sentencing and Punishment 1533
350Hk1533

The standards for a prisoner's Eighth Amendment claim require a demonstration of both an objective and a subjective element; the injury the prisoner suffers must be sufficiently serious to rise to the level of constitutional harm, and defendants' misconduct must demonstrate sufficiently serious culpability, exhibiting evil intent, recklessness or deliberate indifference to a substantial risk of serious harm to inmates under their custody and dependence. U.S.C.A. Const.Amend. 8. ***100** Paul E. Kerson, John F. Duane, New York City, for plaintiffs.

DECISION AND ORDER

MARRERO, District Judge.

Plaintiffs in this action are thirty-seven individual prisoners incarcerated in various facilities operated by New York State's Department of Correctional Services ("DOCS"). They bring this action under 42 U.S.C. § 1983 for alleged violations of their civil rights arising from separate incidents that occurred a thirteen different DOCS prisons. The unlawful conduct plaintiffs describe implicates different combinations of the

numerous defendants, who are the Commissioner of DOCS, the Superintendents of the facilities where the incidents occurred, the corrections officers who participated in causing the injuries plaintiffs claim and various other administrators of the State's prison system. Plaintiffs all claim to have suffered physical injuries caused by assaults perpetrated either by corrections officers or by other inmates at the facilities where they are held.

The common thread that binds plaintiffs' allegations is that of general improper administration of the state prison system, a claim founded on the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626. Plaintiffs' Amended Complaint also sets forth separate causes of action for conspiracy to commit cruel and unusual punishment; conspiracy to violate their civil rights; assault; intentional infliction of emotional distress; respondeat superior liability; negligence; and denial of medical treatment.

As remedies for these alleged violations, plaintiffs request injunctive relief pursuant to the PLRA directing defendants to "implement[ ] new practices and procedures to be determined by this Court designed to end the Reign of Terror now pervading the State's prisons" (*see* Amended Compl., Prayer for Relief); appointment of a Special Master under this Court's direction to supervise defendants in the implementation of such new practices and procedures (*see id.*); and compensatory and punitive damages, and the costs and attorney's fees associated with this action. *See id.*

Six of the plaintiffs in this litigation currently have actions pending in other federal districts in New York. Plaintiffs move to consolidate these actions along with various other pro se claims filed by plaintiffs here arising from the incidents described in their Amendment Complaint. [FN1] Defendants

oppose the consolidation and move to dismiss the Amendment Complaint, claiming lack of subject matter jurisdiction, failure to state a claim, improper venue, improper joinder, qualified immunity, Eleventh Amendment immunity, lack of personal involvement and failure to exhaust administrative remedies. For the reasons described below, the Court denies plaintiffs' motion to consolidate and grants defendants' motion to dismiss. Plaintiffs are granted leave to replead as specified below.

FN1. The six actions are *Britt v. Dep't of Corrections,* 99 Civ. 1672 (S.D.N.Y.); *Dupree v. Couture,* 99 Civ. 1608 (N.D.N.Y.); *Sullivan v. Goord,* 99 Civ. 0474 (N.D.N.Y.); *Smith v. Martin,* 98 Civ. 0081 (N.D.N.Y.); *Mingues v. Bezio,* 96 Civ. 0474 (N.D.N.Y.); and *Barnes v. Goord,* 90 Civ. 7990 (E.D.N.Y.).

I. *PLAINTIFFS' MOTION TO CONSOLIDATE*

Plaintiffs seek to consolidate into one action in this Court the six other actions already brought by some of these plaintiffs and now pending in other federal courts, as well as other claims by these and other prospective plaintiffs alleging similar injuries by reason of defendants' conduct in not properly administering the State's prison system. In effect, plaintiffs seek to establish a case, although not so labeled, akin to a class action challenging State prison conditions and operational practices.

[1][2] Rule 42(a) of the Federal Rules of Civil Procedure authorizes the Court to consolidate for joint hearing or trial any or all matters at issue "[w]hen actions involving a common question of law or fact are pending ***101** before the court." Fed.R.Civ.P.42(a). Among the paramount benefits gained by consolidation are the convenience and efficiency of avoiding "unnecessary costs or delay". *Id.* But these objectives cannot be pursued at the sacrifice of fairness to all the parties. *See Malcolm v. National Gypsum Co.,* 995 F.2d 346, 350 (2d Cir.1993). As the parties seeking consolidation, plaintiffs bear the burden to demonstrate that the actions in question share common issues of law or fact. *See In re Repetitive Stress Injury Litigation,* 11 F.3d 368, 373 (2d Cir.1993).

[3] Plaintiffs' legal theory and claims for relief are grounded on alleged misconduct by defendants generally consisting of failure to protect plaintiffs adequately from assaults by corrections officers and other inmates and of denial of adequate medical treatment. Beyond the similarly among the type of incidents plaintiffs seek to combine here, and their occurrence in the state prison system under the administration of some defendants, plaintiffs have not established any other direct connection between their injuries, the alleged misconduct and the various defendants to demonstrate sufficient common issues of fact or law.

The six cases filed in the other federal courts entail different events occurring at different times and at different facilities. They involve different defendants and different conduct. In fact, these six actions may be but a few of a larger number of other like actions now pending in federal courts in New York entailing complaints by inmates of assaults by prison officials or by other prisoners, or of inadequate attention to inmates'

medical needs. There is no more ground to find common issues of facts or law supporting consolidation with the matter before this Court the particular six actions plaintiffs seek to integrate here than there is such commonality among the perhaps hundreds of other similar cases currently pending in federal courts that were brought by prisoners under § 1983 complaining of comparable misconduct based on equally unrelated incidents.

The Court believes that whatever common issues of law or fact may exist in the cases plaintiffs seek to consolidate are strained and attenuated. Moreover, whatever economy may be achieved by joining these actions, is outweighed by the prejudice and unfairness to the parties being compelled to try their actions in a district far more distant than the one in which the cases were originally filed. Combining into a single action unrelated incidents involving distinct events and disparate parties also carries the *potential* of confusing a jury and of exposing some defendants to the risk of liability by loose institutional association for the unconnected wrongdoing of others.

Finally, because the underlying events are unconnected in time, place and parties, pretrial discovery, examination of records and the filing of motions is likely to proceed separately in any event as to each individual claim, prejudicing by delay the actions of those plaintiffs who may be ready to proceed to trial on the merits sooner that the rest. Nor, as described below, does plaintiffs' attempt to link these unrelated incidents of alleged misconduct by a theory of conspiracy prove any more availing to support consolidation. Plaintiffs' pleadings offer no factual grounds sufficient to tie the events and wrongdoing alleged in the separate actions here at issue into a commonly grounded conspiracy.

Accordingly, the motion to consolidate is denied.

II. *DEFENDANTS' MOTION TO DISMISS*

With regard to the claims that would remain in this Court upon the denial of consolidation, defendants cite a number of procedural, jurisdictional and substantive grounds in support of their motion to dismiss, including, improper venue, improper joinder of claims and parties, and failure to exhaust administrative remedies. The Court finds that a number of the distinct claims plaintiffs raise may be dismissible under some or all of these grounds. Rather than examining the merits of each contention on these bases, however, the Court concludes that dismissal of all the remaining actions is warranted under defendants' contention that plaintiffs fail to state a claim upon which relief can be granted.

***102** A. *STANDARD OF REVIEW*

In considering a motion under a Federal Rule of Civil Procedure 12(b)(6) to dismiss a complaint for failure to state a claim upon which relief can be granted, the Court must accept plaintiff's factual allegations as true, and may properly dismiss the action only if "it appears beyond doubt that the plaintiff [s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). The Court must assess only the sufficiency of the complaint and draw reasonable inferences in favor of plaintiffs.

[4] The Second Circuit has directed that in reviewing the sufficiency of claims brought by incarcerated *pro se* litigants alleging civil rights violations the courts must accord special

leniency. *See Williams v. Vincent,* 508 F.2d 541, 543 (2d Cir. 1974). This judicial solicitude, however, is not intended as a license to sustain any complaint that contains nothing more than descriptions of broad generalizations, shocking conditions, sweeping castigations and unfounded conclusions, but no specific facts from which an actual deprivation of rights may be inferred. *See Barr v. Abrams,* 810 F.2d 358, 363 (2d Cir.1987); *Martin v. New York State Dep't of Mental Hygiene,* 588 F.2d 371, 372 (2d Cir.1978).

[5] Here, plaintiffs, citing the various personal injuries described in their complaints, assert that they are "actual and representative victims of the Reign of Terror that characterizes the current administration of the New York State prison system by the defendants officials...." *See* Plaintiffs' Memorandum of Law in Support of Motion for Consolidation and in Opposition to Defendants' Motion to Dismiss, dated June 16, 2000, at 1. They liken the "brutal unconstitutional conditions" they allege prevail in the State prisons "to the prison system described by ... Aleksandr I. Solzhenitsyn in ... *The Gulag Archipelago....*" *See id.* at 2.

Invoking the Bill of Rights, and the prayers for the country by Benjamin Franklin and George Washington, they invite this Court "to ask itself these questions: Are these defendants living up to the Founders' dream for them? Are they acting justly, are they loving mercy? Are they, by their actions, their negligence, their wantonness, their recklessness, practicing cruel and unusual punishment forbidden to them by the 8th Amendment?" Plaintiffs describe State prison conditions as "positively medieval" and condemn the administration of the system as "defective, improper, negligent and a continued and repeated violation" of the Eighth Amendment and the Civil Rights Laws

of the United States. *See id.* at 9.

[6] To put an end to the Reign of Terror they say threatens inmates day and night with violent cuts or beatings by defendants, plaintiffs urge the Court to enjoin defendants' unlawful acts and to appoint a Special Master to oversee the administration of the State's prison system. Such an intrusion into the domain of State functions and executive authority, extraordinary under any circumstances, on the record here would represent an arrogation of judicial power. Indisputably, plaintiffs, like all prisoners and other persons under the control and dependance of the State, have rights to be reasonably protected from physical harm and are owed a duty to be treated humanely. *See generally Farmer v. Brennan,* 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), *reh'g denied,* 429 U.S. 1066, 97 S.Ct.798, 50 L.Ed.2d 785 (1977); *Hayes v. City of New York Dept. of Corrections,* 84 F.3d 614 (2d Cir. 1996).

When those rights are violated, our system of government incorporates less drastic, more measured and orderly means to redress the wrongs than for judges, through self-appointment, to transform into wardens. The separation of powers and other constitutive safe guards we have built into our federal scheme are designed to protect values as vital to our governmental order as are the individual liberty interests plaintiffs here invoke as crucial to their persons.

The Court does not wish to minimize the gravity of the conditions plaintiffs portray, nor to treat lightly the grievousness of the harm they may have sustained. It may very well be that some of the injuries some of ***103** these plaintiffs

have suffered may be attributed -- some of the stated times--to some wrongdoing by some of the defendants they name. But as described in the complaint before the Court, the interrelationships among the parties, as well as the links between factual cause and effect and constitutional deprivations, fall short. Plaintiffs cannot fill in with rhetoric what the complaint wants in substance. They should not conflate eloquence with law, or substitute fervor for facts. Not all of our Founders' personal aspirations for the nation, however ancient, prayerful or profoundly felt, necessarily give rise to constitutional obligations. Simply put, charged with poignancy and passion though the pleadings here may be, plaintiffs' Amended Complaint is tenuous and slender on the law. It fails to assert sufficient factual allegations to state the elements of the wrongful deprivations of civil rights plaintiffs claim.

B. *THE PLRA*

[7] While plaintiffs contend that prison conditions in the State fail to comply with constitutional standards, as evidence their Amended Complaint relies on each of the plaintiffs' unrelated incidents of assault by different corrections officers or other inmates occurring at thirteen distinct prison facilities during a period spanning over ten years. As a remedy for the conditions plaintiffs describe, they invoke Section 3 626 of the PLRA, asking for broad injunctive relief and the appointment of a Special Master.

On the basis of sparse, loosely related allegations, what plaintiffs effectively press this Court to do is to supplant the State's prison administrators and constitute itself as overseer of New York's corrections system. Aside from the practical and

constitutional deficiencies inherent in that proposition, plaintiffs' suggested remedy is not supported by the very statute they invoke. The PLRA provides that the Court shall not grant any prospective relief unless it finds that "such relief is narrowly drawn, extends no further than necessary to correct the violation of Federal right, and is the least intrusive means necessary to correct the violation of the federal right." 18 U.S.C. § 3626(a)(1)(A).

For these reasons, the Court therefore finds that plaintiffs have failed to state sufficient grounds for the relief they seek under the PLRA.

C. *CONSPIRACY*

[8] Plaintiffs contend that the "Reign of Terror" they describe as pervading the entire State prison system is a product of an extensive conspiracy among defendants to commit cruel and unusual punishment in violation of the Eighth Amendment and the civil rights of the State's prison population. But other than sweeping, conclusory pleadings of conspiracy, plaintiffs offer no factual basis of any agreement, action in concert or overt conduct by any of the defendants that falls within the scope of conspiracy to deprive plaintiffs of their civil rights. *See Jews for Jesus, Inc. v. Jewish Community Relations Council of New York, Inc.*, 968 F.2d 286, 290-91 (2d Cir.1992); *Polur v. Raffe*, 912 F.2d 52, 56 (2d Cir.1990), *cert. denied*, 499 U.S. 937, 111 S.Ct. 1389, 113 L.Ed.2d 446 (1991). Consequently, plaintiffs' conspiracy claims must be dismissed.

D. *EIGHTH AMENDMENT*

The crux of plaintiffs' constitutional claims is that defendants

failed adequately to protect them from prison officials or from other inmates, as a consequence of which they suffered grievous assaults, and that they were not offered proper medical care for their injuries. Adequately plead, and citing sufficient factual details of the attacks, some of the incidents plaintiffs describe may be sufficient to withstand a motion to dismiss. Indeed, standing alone a number of these claims remain active as separate claims in other actions already pending in other courts. But the theory plaintiffs present to this Court in their Amended Complaint is that these disparate actions by defendants must be viewed collectively, and that in their totality they constitute a massive, concerted and repeated violation of the Eighth Amendment and of plaintiffs' civil rights under § 1983.

The Court finds insufficient basis in plaintiffs' Amended Complaint to sustain their constitutional theory of liability. By their own account, a number of the attacks plaintiffs cite as evidence of defendants' wrongful ***104** failure to protect were committed not by any defendants, but by unknown inmates. As regards these assaults, plaintiffs do not allege that defendants knew of the assaults and failed to prevent them, or that defendants did not respond properly once they became aware of the attacks. Nor do they furnish any more specifics identifying by which defendants and in what particular ways plaintiffs were deliberately deprived of adequate medical treatment.

[9] These allegations do not satisfy the prerequisites to state a claim under the Eighth Amendment. The standards for such a claim require a demonstration of both an objective and a subjective element. The injury the prisoner suffers must be sufficiently serious to rise to the level of constitutional harm,

and defendants' misconduct must demonstrate sufficiently serious culpability; it must exhibit evil intent, recklessness or deliberate indifference to a substantial risk of serious harm to inmates under their custody and dependence. *See Farmer,* 511 U.S. at 833, 114 S.Ct. 1970; *Estelle,* 429 U.S. at 103, 97 S.Ct. 285; *Hathaway v. Coughlin,* 37 F.3d 63, 66 (2d Cir. 1994), *cert. denied,* 513 U.S. 1154, 115 S.Ct. 1108, 130 L.Ed.2d 1074 (1995); *Williams v. Vincent,* 508 F.2d 541, 546 (2d Cir. 1974). Some of the pleadings' same causal and fault infirmities render plaintiffs' § 1983 claims deficient for the additional reasons that there is no indication of personal involvement by some defendants in the alleged constitutional violations. *See Monell v. Dept. of Soc. Servs.,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

Plaintiffs' federal claims are consequently dismissed in their entirety, with leave to replead granted as to the claims of plaintiffs who are parties to the underlying action before the Court.

E. *STATE LAW CLAIM*

In addition to their federal claims under the PLRA, the Eighth Amendment and § 1983, plaintiffs allege separate causes of action for assault, intentional infliction of emotional distress, respondeat superior tort liability and negligence. These claims rest essentially on state law. With the dismissal of plaintiffs' federal claims, the Court declines to exercise supplemental jurisdiction over the remaining claims. *See generally Purgess v. Sharrock,* 33 F.3d 134, 138 (2d Cir.1994). By the same token, the Court finds it unnecessary to address defendants' defenses based on qualified immunity and Eleventh Amendment.

III. *ORDER*

For the reasons set forth above, it is hereby

ORDERED that plaintiffs' motion to consolidate with this case the other matters specified above that were brought by some of the plaintiffs herein and pending in other district courts in denied; and it is further

ORDERED that defendants' motion to dismiss the Amended Complaint for failure to state a claim upon which relief can be granted is granted; and it is finally

ORDERED that the Clerk of Court is directed to close this case, provided that the matter may be reopened if within thirty (30) days from the date of entry of this Order plaintiffs to the underlying action before this Court file a Second Amended Complaint relating to their claims.

197 F.R.D. 98, 48 Fed.R.Serv.3d 600

END OF DOCUMENT

192 F.Supp.2d 208

(Cite as: 192 F.Supp.2d 208)

United States District Court,
S.D. New York.

Michael WEBB, Donyell Beckwith, Willie Bradley, Mariano Cappelanmena, Timothy Collier, Steven Corbett, Rene Ellis, Leon Hardy, Tommy Jackson, Jr., Jeffrey McNeil, Brian Morgan, Jimmy Ramos, Shaka Reynolds, Eric Smith, Angel Valentine, James Walls, Edward Walsh, Sam Waters, Richard Weatherly, Harry Williams, Rodney Wright, Herbert Burgess, Manny Cabassa, Andres Chaparro, Shawn Cornwall, Gerald Derosse, Michael McKenzie, Daniel Morales, Thomas Murphy, Cornelius Ricks, and George Simmons, Plaintiffs,

v.

Glenn S. GOORD, Individually and as Commissioner of the New York State Dept. of Correctional Services; Dr. Lester Wright, Individually and as Associate Commissioner for Health Services of the New York State Dept. of Correctional Services; Frank Headley, Individually and as Superintendent of the Arthur Kill Correctional Facility; Daniel Senkowski, Individually and as Superintendent of the Clinton Correctional Facility; Charles Greiner, Individually and as Superintendent of the Sing Sing Correctional Facility; Earl Couture, Individually and as Superintendent of the Gouverneur Correctional Facility; Michael Mcginnes, Individually and as Superintendent of the Southport

Correctional Facility; Edward Reynolds, Individually and as Superintendent of the Mohawk Correctional Facility; Robert Kuhlmann, Individually and as Superintendent of the Sullivan Correctional Facility; Melvin L. Hollins, Individually and as Superintendent of the Oneida Correctional Facility; Mr. Connelly, as Deputy of Security of Sing Sing Correctional Facility; Mr. Gebber as Correctional Counsel of Sing Sing Correctional Facility; Peter Lacy, Individually and as Superintendent of the Bare Hill Correctional Facility; Brian Malone, as Inspector General of Docs; Sgt. Berios; Netti Condell, Correction Counselor, Joseph Mccoy, Individually and as Superintendent of the Cayuga Correctional Facility; Sgt. Huggins; Sgt. Blankenship; Officer Daniel Crumb; Officer Putnam; Officer John Doe Kelly of E-2 Unit; Officer Wein; Officer Foster; Lt. Caldwell; Sgt. Bishop; Deputy Superintendent Connelly; Lt. Sherman, Lt. Farrel; Sgt. Vaughn; Correction Officer Hood; Charles Dufrain, Individually and as Superintendent of the Franklin Correctional Facility; Mr. Sweeney, as Deputy Superintendent of Security at the Gouverneur Correctional Facility; Captain Rabsatt; Sgt. Bourgal; Correction Officer R. Nagle; Correction Officer T. Link; Correction Officer J. Marnell; Correction Officer S. Strader; Correction Officer S. Stewart; Correction Officer M. Kiesznosk; Correction Officer Carey; Correction Officer Norman; Correction Officer Robert Pierce; Correction Officer Carey; Correction Officer Norman; Correction Officer Reif; Correction Officer Theabold; Correction Officer Honsky; Correction Officer Begin; Correction Officer D. Devito; Correction Officer Flint; Correction Officer

Sweeny; Correction Officer Sgt. Bishop; Correction Officer Lt. Huckeba; Correction Officer P. Perry; Correction Officer T. Beck; Correction Officer Stevenson; Correction Officer Jordan; Correction Officer Nelson; Correction Officer Burlingame; Lt. Almstead; Correction Officer Stephen Martin; Correction Officer K. Ramsey; Correction Officer John Goeis; and Correction Officers John Doe #1-100 whose true names are unknown to plaintiffs, Correction Officer E. Cruz; Correction Officer T. Wilson; Correction Officer "John" Woodley; Correction Officer "John" Wygate; Edward Donnelly, Individually and as Superintendent of the Wende Correctional Facility; Christopher Aruz, Individually and as Superintendent of the Greenhaven Correctional Facility; and Floyd Bennett, Individually and as Superintendent of the Elmira Correctional Facility, Defendants.

No. 99 CIV. 10394(VM).

March 28, 2002

Current and former state inmates filed § 1983 action alleging that prison conditions failed to comply with constitutional standards as result of unrelated incidents of assault by different corrections officers or other inmates. After dismissal of first amended complaint, 197 F.R.D. 98, inmates filed second amended complaint. On prison officials' motion to dismiss, the District Court, Marrero, J., held that inmates had to exhaust administrative remedies before filing § 1983 suit.

Motion granted.

West Headnotes

[1] Civil Rights 209
78k209

State inmates alleging that prison officials conspired to deprive them of their Eighth Amendment rights by failing to prevent assaults by prison guards and other inmates were required under Prison Litigation Reform Act to exhaust administrative remedies before filing § 1983 action. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983; Civil Rights of Institutionalized Persons Act, § 107, 42 U.S.C.A. § 1997e.

***209** Paul E. Kerson, John F. Duane, Leavitt, Kerson & Leffer, New York City, for Plaintiffs.

210 *DECISION AND ORDER

MARRERO, District Judge.

Defendants, including seventy-two named and one hundred unnamed parties, move to dismiss the Second Amended Complaint in this action brought by thirty-one plaintiffs, all current inmates, with the exception of one former prisoner, in various correctional facilities throughout New York State. For the reasons set forth below, the motion to dismiss is granted.

BACKGROUND

On September 29, 2000, this Court issued a Decision and Order (the "Decision"), familiarity with which is assumed, granting defendants' motion to dismiss the Amended Complaint in this matter. [FN1] At that time, the Court denied plaintiffs' motion to consolidate the claims of these thirty-one plaintiffs with

those of six others who had earlier filed individual actions in other district courts in accordance with the relevant venue provisions, 28 U.S.C. § 1391. Furthermore, the Court noted a number of serious deficiencies in plaintiffs' complaint with warranted dismissal of the Amended Complaint. Nevertheless, the Court granted defendants' motion with leave to replead, affording plaintiffs a chance to file a Second Amended Complaint.

> FN1. The Court's decision is reported as *Webb v. Goord,* 197 F.R.D. 98 (S.D.N.Y.2000)("*Webb*").

Under normal circumstances, the Court would find it unnecessary to remind plaintiffs that leave to amend is premised on the understanding that the subsequent filing shall make a good faith effort to cure the deficiencies of the preceding one. Nevertheless, it is clear from the face of the Second Amended Complaint that plaintiffs made no effort whatsoever to address the insufficiencies that the Court had noted in its earlier Decision. In fact, the only changes in the Second Amended Complaint reflect plaintiffs' voluntary abandonment of their claim under the Prison Litigation Reform Act, 18 U.S.C. § 3626, and the exclusion of six of the original plaintiffs who properly chose to pursue their individual claims in other courts or districts. [FN2] Aside from these notable deletions, plaintiffs made no attempt to support the string of speculations and conclusory assertions in the Amended Complaint.

> FN2. The six plaintiffs in the original action who have decided to pursue earlier filed actions in other courts are Gregory Barnes, Don Juan Britt, Hunter DuPree, William Mingues, Timothy Smith and Lance Sullivan.

DISCUSSION

Because of plaintiffs' complete failure to address any of the deficiencies in the Amended Complaint, the Court has no alternative but to grant defendants' motion to dismiss the Second Amended Complaint for the exact same reasons set forth in the Court's Decision. *See Webb,* 197 F.R.D. at 102-04.

Specifically, with regard to plaintiffs' claim of conspiracy to violate their civil rights pursuant to 42 U.S.C. § 1983, the Court found that they "offer no factual basis of any agreement, action in concert or overt conduct by any of the defendants that falls within the scope of conspiracy to deprive plaintiffs of their civil rights." *Webb,* 197 F.R.D. at 103 (citing *Jews for Jesus, Inc. v. Jewish Community Relations Council of New York, Inc.,* 968 F.2d 286, 290-91 (2d Cir.1992) and *Polur v. Raffe,* 912 F.2d 52, 56 (2d Cir.1990), *cert. denied,* 499 U.S. 937, 111 S.Ct. 1389, 113 L.Ed.2d 446 (1991)). Because plaintiffs have chosen not to provide any more than the conclusory allegations of conspiracy ***211** made in their Amended Complaint, the present claim of conspiracy also fails.

Furthermore, the Court granted defendants' motion to dismiss plaintiffs' Eighth Amendment claim in the Amended Complaint in part because "plaintiffs do not allege that defendants knew of the assaults and failed to prevent them, or that defendants did not respond properly once they became aware of the attacks. Nor do they furnish any more specifics identifying by which defendants and in what particular ways plaintiffs were deliberately deprived of adequate medical treatment." *Webb,* 197 F.R.D. at 104. With respect to other aspects of their Eighth Amendment claims, plaintiffs failed to plead the requisite intent, recklessness or deliberate

involvement necessary to impute liability to defendants in supervisory roles. *Id.* The Court finds no reason to sustain the exact same unsubstantiated claim under the Eighth Amendment made in the Second Amended Complaint.

Having failed to state a claim for any violation of federal law, the Court declines to exercise supplemental jurisdiction over plaintiffs' remaining state law claims of assault, intentional infliction of emotional distress, respondeat superior liability, negligence and denial of medical treatment. *See id.*

With respect to the motion to dismiss the Amended Complaint, the Court acknowledged that most, if not all, of the plaintiffs' claims could be dismissed upon any number of grounds advanced by defendants. The Court found it unnecessary to address all of those ground because plaintiffs had simply failed to state a claim upon which relief could be granted. In connection with the present motion, the Court finds it similarly unnecessary to address all the possible grounds that would support dismissal. Nevertheless, it is important to note that since the filing of the parties' motion papers, the state of the law with respect to litigation by prison inmates has been clarified measurably by the Supreme Court's decision in *Porter v. Nussle,* 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002). In interpreting the 1995 amendments to the Prison Litigation Reform Act, 42 U.S.C. § 1997e, the Court held that "[e]ven when the prisoner seeks relief not available in grievance proceedings, notably money damages, exhaustion is a prerequisite to suit. And unlike the previous provision, which encompassed only § 1983 suits, exhaustion is now required for 'all action[s] ... brought with respect to prison conditions,' whether under § 1983 or 'any other Federal law.'" *Id.* at 987 (citations omitted).

In light of the clarification in *Nussle,* plaintiffs' argument that "[e]xhaustion of administrative remedies is absolutely not required in this case," is entirely untenable. (Plaintiffs' Memorandum of Law in Opposition to Defendants' Third Motion to Dismiss, dated September 5, 2001, at 1.) Because plaintiffs have failed to allege any facts or circumstances substantiating their compliance with the exhaustion requirement, the complaint should be dismissed on these alternative grounds.

In closing, the Court reiterates the serious and concerned deliberation with which it has approached plaintiffs' allegations. *See Webb,* 197 F.R.D. at 102-03 ("The Court does not wish to minimize the gravity of the conditions plaintiffs portray, nor to treat lightly the grievousness of the harm they may have sustained."). Indeed, some of plaintiffs' allegations describe injury and harm of a chillingly brutal nature. The current posture of this case, however, convinces the Court that dismissal of the Second Amended Complaint is the only appropriate outcome; plaintiffs were given the chance to cure the legal deficiencies in ***212** their Amended Complaint, but they simply chose not to avail themselves of the second chance.

Nevertheless, in light of the gravity of plaintiffs' allegations, the Court feels compelled to point out that plaintiffs may have on final bite at the apple. Although plaintiffs have failed to state any claims in this action upon which relief may be grounded and although their allegations of a sweeping, state-wide conspiracy to violate prisoners' civil rights were wholly unsubstantiated, each plaintiff may have the right, to the extent not yet precluded by applicable law, to file individual action in accordance with the relevant venue provisions of 28 U.S.C. § 1391 and assuming that plaintiff has knowledge of specific

facts that would support a claim for relief. Although some plaintiffs may wish to avail themselves of these alternatives, the Court cautions each individual plaintiff before so proceeding to weigh carefully all of the elements necessary to sustain the cause of action alleged in light of the pleading and exhaustion requirements set forth above and the deficiencies the Court previously noted in *Webb* and again above.

CONCLUSION AND ORDER

For the reasons set forth above, it is hereby

ORDERED that defendants' motion to dismiss plaintiffs' Second Amended Complaint [Doc. No. 26] is GRANTED; and it is further

ORDERED that the Clerk of Court is directed to close this case.

SO ORDERED.

END OF DOCUMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL WEBB, et al., 99 Civ. 10394 (VM)

Plaintiffs, **ORDER**

-against-

GLEN S. GOORD, Commissioner of the New York States Department of Correctional Services, et al.,

Defendants.

VICTOR MARRERO, United States District Judge.

By letter to the Court dated July 31, 2002 and related papers, plaintiffs move the Court for reconsideration of its Decision of March 28, 2002 dismissing the complaint in the captioned case. The basis stated in support of the request is the ruling of the Supreme Court in *Hope v. Pelzer,* ___ U.S. ___, 122 S. Ct. 2508 (June 27, 2002), which plaintiffs contend may provide some support for the Eight Amendment claims they asserted in the case this Court dismissed.

Putting aside the untimeliness of their motion for reconsideration, which under Local Rule 6.3 must be filed within ten days of the Court's decision on the original motion, the Court finds nothing in its reading of Supreme Court's holding in *Hope* that is in any way germane to the reasons for this Court's Order of March 28, 2002. The principal grounds articulated there to warrant the dismissal of the complaint related to the procedural and practical deficiencies, identified

by the Court in its earlier dismissal of the action with leave to amend, which plaintiffs failed to address in their subsequent repleadings.

Accordingly, plaintiffs' request for reconsideration herein is DENIED.

SO ORDERED.

Dated: New York, New York
6 August, 2002

s/
Victor Marrero
U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2002

(Argued: March 6, 2003 Decided: August 13, 2003)

Docket Nos. 02-0097 (L); 02-0233

MICHAEL WEBB, DONYELL BECKWITH, WILLIE BRADLEY, MARIANO CAPPELANMENA, TIMOTHY COLLIER, STEVEN CORBETT, RENE ELLIS, LEON HARDY, TOMMY JACKSON, JR., JEFFREY MCNEIL, BRIAN MORGAN, JIMMY RAMOS, SHAKA REYNOLDS, ERIC SMITH, ANGEL VALENTINE, JAMES WALLS, EDWARD WALSH, SAM WATERS, RICHARD WEATHERLY, HARRY WILLIAMS, RODNEY WRIGHT, HERBERT BURGESS, MANNY CABASSA, ANDRES CHAPARRO SHAWN CORWALL, GERALD DEROSSE, MICHAEL MCKENZIE, DANIEL MORALES, THOMAS MURPHY, CORNELIUS RICKS, and GEORGE SIMMONS,

Plaintiffs-Appellants,

-v.-

GLENN S. GOORD, Individually and as Commissioner of the New York State Dept. of Correctional Services, DR. LESTER

WRIGHT, Individually and as Associated Commissioner for Health Services of the New York State Dept. of Correctional Services, FRANK HEADLEY, Individually and as Superintendent of the Arthur Kill Correctional Facility, DANIEL SENKOWSKI, Individually and as Superintendent of the Clinton Corrrectional Facility, CHARLES GREINER, Individually and as Superintendent of the Sing Sing Correctional Facility, EARL COUTURE, Individually and as Superintendent of the Governeur Correctional Facility, MICHAEL MCGINNES, Individually and as Superintendent of the Southport Correctional Facility, EDWARD REYNOLDS, Individually and as Superintendent of the Mohawk Correctional Facility, ROBERT KUHLMANN, Individually and as Superintendent of the Sullivan Correctional Facility, MELVIN L.HOLLINS, Individually and as Superintendent of the Oneida Correctional Facility, CONNELLY, Mr., as Deputy Director of Security Sing Sing Correctional Facility, GEBBER, Mr. As Correctional Counsel of the Sing Sing Correctional Facility, PETER LACY, Individually and as Superintendent of the Bare Hill Correctional Facility, BRIAN MALONE, as Inspector General of the DOCS, BERIOS, Sgt., NETTI CONDELL, Correction Counselor, JOSEPH MCCOY, Individually and as Superintendent of the Cayuga Correctional Facility, HUGGINS Sgt., BLANKENSHIP, Sgt., DANIEL CRUMB, Officer, PUTNAM, Officer, JOHN DOE KELLY, Officer, WEIN, Officer, FOSTER, Officer, CALDWELL, Lt., BISHOP, Sgt., CONNELLY, Deputy Superintendent, SHERMAN, Lt., FARREL, Lt., VAUGHAN, Sgt., HOOD, Correction Officer, CHARLES DUFRAIN, Individually and as Superintendent of the Franklin Correctional Facility, SWEENEY, Mr., as Deputy Superintendent of Security at the Governeur Correctional Facility, RABSATT, Captain, BOURGAL, Sgt., R. NAGLE, Correction Officer, T. Link, Correction Officer.

Defendants-Appellees.

Before:

POOLER, SACK, and B.D. PARKER, JR.,
Circuit Judges.

Appeal from the Decision and Order, dated March 28, 2002, of the United States District Court of Southern District of New York (Victor Marrero, Judge) dismissing the plaintiffs' second amended complaint.

Affirmed.

PAUL E. KERSON, John F. Duane (of counsel), Koppell, Leavitt, Kerson, Leffler & Duane, New York, NY, for *Plaintiffs-Appellants*.

DAVID LAWRENCE III, Assistant Solicitor General, Eliot Spitzer, Attorney General of the State of New York, and MICHAEL BELOHLAVEK, Deputy Solicitor General (of counsel), New York, NY, for *Defendants-Appellees*.

POOLER, *Circuit Judge:*

The original complaint in this action was filed on October 8, 1999, and an amended complaint was filed on January 14, 2000 before the defendants had responded to the original

complaint. The district court dismissed the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), but granted the plaintiffs an opportunity to replead their allegations. *Webb v. Goord,* 197 F.R.D. 98 (S.D.N.Y. 2000). The plaintiffs filed a second amended complaint on October 27, 2000, but the district court again ruled that dismissal was warranted pursuant to Rule 12(b)(6). *Webb v. Goord,* 192 F. Supp. 2d 208 (S.D.N.Y. 2002). The plaintiffs appeal from this second dismissal.

FACTS

The plaintiffs, with the exception of one who has been released, are inmates incarcerated in various correctional facilities administered by the New York State Department of Correctional Services ("DOCS"). The second amended complaint names an array of defendants: (1) the Commissioner of DOCS; (2) the Health Commissioner of DOCS; (3) the Inspector General of DOCS; (4) the Superintendents of fourteen separate correctional facilities administered by DOCS; (5) approximately fifty other DOCS employees, most of whom are corrections officers, and many of whom are identified only by their last name; and (6) one hundred "John Doe" defendants alleged to be DOCS corrections officers.

The second amended complaint alleges that each of the plaintiffs suffered a violation of his civil rights as a result of actions, or failures to act, on the part of DOCS officials and employees. Specifically, the second amended complaint alleges the occurrence of more than forty incidents that resulted in serious physical injury to the plaintiffs, including attacks by corrections officers, improper physical punishments, attacks by other inmates for which the defendants are responsible because

of their failure to provide a safe prison environment, and denials of medical care to plaintiffs suffering from injury and illness.

Some features of these allegations stand out. First, the second amended complaint only sets forth the most basic facts of the incidents alleged to have resulted in injury. For the most part, each plaintiff is allotted one paragraph of the complaint, which provides the place and approximate time of the incident involving him, along with a sentence or two concerning the injury alleged to have arisen from the incident.

Further, the incidents are dispersed across time and space. That is, the events complained of are alleged to have taken place at fourteen separate DOCS facilities and, while most of the incidents are alleged to have taken place between 1997 and 1999, incidents occurring as long ago as 1990 are included in the second amended complaint. The plaintiffs' allegations therefore share a common nucleus of operative fact only in a very broad sense.

The second amended complaint asserts federal causes of action under the Eighth Amendment to the United States Constitution and under 42 U.S.C. Section 1983. It also asserts common law claims of assault, intentional infliction of emotional distress, respondeat superior liability, negligence, and "denial of medical treatment."

In spite of the brevity with which the plaintiffs' factual allegations are set forth, the second amended complaint constitutes a catalog of violence and ill treatment toward the plaintiffs. Numerous incidents resulting in, among other things, lacerations, serious bruises and fractures are alleged. For

example, plaintiff Edward Walsh alleges that, after DOCS officials denied his request to be placed in protective custody, he was attacked so brutally by other inmates that he received facial wound requiring sixty-eight stitches. Plaintiff Rodney Wright alleges that he required thirty-five stitches to close a wound received as a result of an attack by other inmates. Plaintiff Michael McKenzie alleges that an attack by corrections officers left him with seventeen broken bones in his face. It is neither trite nor patronizing for the Court to recognize the seriousness of such allegations.

After the first amended complaint was filed, the plaintiffs sought discovery as to matters going far beyond the specific events alleged therein. For example, the plaintiffs requested that the defendants produce "[a] list of the number of incidents in the past year where prisoners received 5 or more stitches" and "[a] list of the number and nature of complaints by prisoners against [DOCS] personnel for brutality and/or use of excessive force."

The second amended complaint specifically seeks relief only in the form of compensatory damages for each plaintiff. In correspondence with the district court, however, both before and after the dismissal of the second amended complaint, the plaintiffs' counsel asserted that much broader relief was appropriate. In a letter to the district court, dated April 3, 2000, the plaintiffs' counsel asserted that "an extraordinary event" had occurred in that *The New Yorker* magazine, in its issue of April 3, 2000, had published an article entitled "Guarding Sing Sing." The article, written by Ted Conover, a journalist who had taken a job as a corrections officer at a DOCS facility,

describes several instances of brutality toward inmates.[1] None of these instances of brutality, however, involved any of the plaintiffs. Nevertheless, the plaintiffs' counsel asserted that the article "constitutes substantial admissions that tend to prove all of the allegations in this case and cry out for the appointment of a Special Master to govern the state prison system pursuant to the Prison Litigation Reform Act (PLRA), 18 U.S.C. Section 3626."

Further, after the second amended complaint was dismissed, the plaintiffs moved for reconsideration in light of the U.S. Supreme Court's decision in *Hope v. Pelzer,* 536 U.S. 730 (2002), which was issued on June 27, 2002. According to the plaintiffs' counsel, *Hope* not only established that summary judgment should be granted in favor of the plaintiffs, but also that "[a] Special Master should be appointed to run DOCS pursuant to the Prison Litigation Reform Act (PLRA), 18 U.S.C. Section 3626." the district court subsequently denied the motion for reconsideration.

DISCUSSION

We review *de novo* a district court's dismissal of a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). *See Scutti Enters., LLC v. Park Place Entertainment Corp.,* 322 F.3d 211, 214 (2d Cir. 2003). Employing this standard, we affirm the district court.

---

[1] The article was excerpted from a highly acclaimed book. *See* Ted Conover, *Newjack: Guarding Sing Sing* (2000). The book won the National Book Critics Circle Award and was a finalist for the Pulitzer Prize.

I. The General Inadequacy of the Second Amended Complaint.

In its opinion dismissing the first amended complaint, the district court expressed puzzlement that the instant action "although not so labeled, [is] akin to a class action challenging State prison conditions and operational practices." *Webb v. Goord,* 197 F.R.D. 98, 100 (S.D.N.Y. 2000). In none of the three complaints that have been filed in this action do the plaintiffs actually assert class action claims pursuant to Federal Rule of Civil Procedure 23. This seems to us to be the most striking thing about this case. If anything, we have even more reason to be puzzled than was the district court because the bulk of the law upon which the plaintiffs rely on this appeal is class action law, and a good part of oral argument was devoted to the question of why this case was *not* brought as a class action. In sum, this case looks, walks, and sounds like a class action, but yet is not one.

We hasten to add that, because this case has not been brought as a class action, class action law is not dispositive as to our decision to affirm the district court. But we feel that some discussion of the class action law of this Circuit is highly useful to the explanation of our decision. For herein lies an explanation of the fundamental infirmity of the second amended complaint. Amalgamating more than forty discrete incidents of misconduct by DOCS officials does not make for a sustainable lawsuit. As the district court recognized, the claim of each individual plaintiff, standing alone, may or may not have merit. But, taken together, the claims do not establish the existence of a policy or practice existing throughout the DOCS system, or within a single DOCS facility, such that manageable discovery or a reasonable trial could be held in this action.

Our Circuit has expressed some trepidation regarding the efficacy of class action litigation in providing relief to individual inmate plaintiffs who claim that prison conditions, or the actions of prison officials, have violated their civil rights. In *Blyden v. Mancusi,* 186 F.3d 252 (2d Cir. 1999), we considered the results of a district court's treatment of class action litigation arising from injuries allegedly suffered by inmates during the infamous 1971 disturbances at the Attica prison. The allegations specifically claimed that punishments meted out to inmates by prison officials and corrections officers once control of Attica had been regained after an inmate takeover of the facility violated the Eighth Amendment. Although we acknowledged the propriety of certifying a class of inmates when it was foreseeable that the parties might reach a settlement agreement, *id.,* at 269-70, we expressed skepticism that trials conducted by the district court could have adequately assessed the damages suffered by each member of the inmate class:

> We cannot claim to have the same familiarity with the record as the district court, but, even at a glance, the case bristles with individual issues. For example, the determination of what acts constituted "reprisals" involves consideration of a variety of conduct, including forcing the inmates to strip and lie on the ground, making them run through gauntlets, beatings during the gauntlets, singling out and beating the leaders, and more random acts of violence against individual prisoners. As to each, a trier [of fact] must determine what happened and . . . its constitutional significance.

Id., at 271. Still, district courts in our Circuit continue to properly recognize the utility of the class action device in suits

challenging prison conditions when they believe that the requirements of Rule 23 have been met. *See, e.g., Ingles v. City of New York,* 2003 WL 402565 (S.D.N.Y. Feb. 20, 2003) (certifying inmate class alleging use of excessive force in facilities operated by the New York City Department of Correction).

As already noted, however, the plaintiffs have not attempted to maintain a class action. If they had done so, it is likely that we would consider the concerns expressed in *Blyden* to be highly relevant. While that case "bristle[d] with individual issues," the factual allegations pled in the second amended complaint present nothing but individual issues. While *Blyden* arose out a single event–the Attica disturbances–the instant case arises from more than more than forty discrete acts of alleged misconduct encompassing a range of defendants so broad that their only substantial relation to one another is that they are all associated with DOCS. This case simply cannot be sustained as an action seeking to adjudicate claims and defenses arising from acts of misconduct which are only substantially related because they all are alleged to have occurred at DOCS facilities. The sheer diffuseness of the plaintiffs' allegations completely subverts their federal law claims.

II. Eighth Amendment Claims.

The Eighth Amendment prohibits "cruel and unusual punishments." Again, it is possible that any of the individual incidents alleged by the plaintiffs may amount to a violation of the amendment in an action involving that incident alone. But proving this for any single incident would be extremely impractical in the context of a trail adjudicating claims arising

from more than forty incidents. With respect to proving a violation of the Eighth Amendment by DOCS as a whole, the plaintiffs have not shown that more than forty unrelated incidents occurring over ten years at thirteen separate DOCS facilities can satisfy their burden of proving that "the conditions of [their] confinement violate contemporary standards of decency." *Phelps v. Kapnolas,* 308 F.3d 180, 185 (2d Cir. 2002) (per curiam).

Specifically, the necessary foundation of a finding that a prison *system* has violated the Eighth Amendment is evidence of a concerted intent among prison officials, one expressed through discernable regulations, policies or practices. It is by no means the case that federal courts have recently become indifferent to claims charging systemic violations of the Eighth Amendment by the concerted acts of prison officialdom. Nor is it the case that such claims are guaranteed a favorable hearing.*Compare Overton v. Bazzetta,* ___U.S. ___, ___, 123 S. Ct. 2162, 2170 (2003) (denying Eighth Amendment challenge to Michigan state prison policy of restricting visitation rights of prisoners who have violated regulations on substance abuse) *with Hope v. Pelzer,* 536 U.S. 730 (2002) (declaring Alabama state prison policy of shackling prisoners to hitching posts to be a violation of the Eighth Amendment.

But the cases just cited stand apart from the instant case in that *systemic* abuses were at issue, while this case involves a series of discrete incidents taking place within a single prison system over a long period of time. It is impossible for us to be more precise here without resorting to the vocabulary of metaphysics, but we hope we are not misunderstood when we assert that an accumulation of incidents–we do not say "a *mere* accumulation" does not necessarily amount to a qualitative

violation of the Eighth Amendment.

III. Conspiracy to Violate Civil Rights.

The plaintiffs' claim under 42 U.S.C. § 1983, which is styled "Conspiracy to Violate Civil Rights," should actually be stated as a claim under Section 1985, which applies specifically to conspiracies. In order to maintain an action under Section 1985, a plaintiff "must provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end." *Roomer v. Morgenthau,* 119 F. Supp. 2d 346, 363 (S.D.N.Y. 2000) (citation omitted); *see also Warburton v. Underwood,* 2 F. Supp.2d 306, 319 (W.D. N.Y. 1998) (plaintiff stated claim of conspiracy to violate civil rights where prison officials allegedly conspired to force him to participate in drug treatment program that compromised his religious beliefs.*)* The plaintiffs have not alleged, except in the most conclusory fashion, that any such meeting of the minds occurred among any or all of the defendants. Their conspiracy allegation must therefore fail. *See Boddie v. Schnieder,* 105 F.3d 857, 862 (2d Cir. 1997) (dismissal of "conclusory, vague or general allegations of conspiracy to deprive a person of constitutional rights" is proper).

IV. Appointment of a Special Master.

The plaintiffs assert that, pursuant to the Prison Litigation Reform Act ("PLRA") Pub. L. No. 104-134, 110 Stat. 1321-70 (1996), *codified at* 18 U.S.C. § 3626, a special master should be appointed to essentially administer DOCS in order to ensure its compliance with the Eighth Amendment. If one looks only at this country's history of prisoner rights litigation *before* the

passage of the PLRA, this request is understandable. In a comprehensive assessment of this history, two political scientists have asserted that it amounts to "our nation's most aggressive campaign of judicial policy making." Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons*, at 263, (1998). A primary means through which this campaign was effected was the appointment of special masters to oversee prison conditions. This was largely because "[t]he power to appoint a compliance coordinator, more familiarly known as a special master, is traditionally regarded as an inherent power of an equity court and is explicitly authorized by the Federal Rules of Civil Procedure." *Id.* at 75 (citing Fed. R. Civ. Pro. 53(b)).

Whether or not the actions of the federal courts throughout this history was consistent with their proper role in our polity, and with the effective manifestation of the Eighth Amendments ideals, is the subject of much argument. But there is no argument over whether or not the PLRA represents a fundamental break with this history. The PLRA has substantially limited the capacity of federal courts to appoint special masters to oversee prison conditions, specifically in order to ensure compliance with the Eighth Amendment. This may or may not be a good thing, but "Congress's ability to take action of this sort demonstrates that the courts are not nearly so imperial, or unstoppable, as their critics have claimed, even when grounding their authority on the Constitution." *Id.* at 383.

We hope it goes with saying that we cannot disregard the requirements set forth in the PLRA. That statute provides that a federal court may not grant any prospective relief at all–let alone appoint a special master to administer a state prison system–unless the court finds that "such relief is narrowly

drawn, extends no further than necessary to correct the violation of the Federal right, and is the least instrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626 (a)(1)(A). The mere assertion that the appointment of a special master is appropriate obviously does not meet these strictures.

V. Exhaustion of Administrative Remedies.

The PLRA further provides that a plaintiff may not bring a suit in federal court challenging prison conditions "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). It is uncontested that none of the plaintiffs has alleged that he has exhausted available administrative remedies.

There was formerly some question as whether the PLRA's exhaustion requirement reached suits involving individual instances of prison misconduct, as opposed to prison conditions generally. In *Porter v. Nussle,* 534 U.S. 516, 532 (2002), however, the Supreme Court established that "the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes." The plaintiffs attempt to escape the holding of *Porter* by contending that it should not be retroactively applied.

"When [Supreme] Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the] announcement of the rule." *Harper v. Virginia Dep't. of Taxation,* 509 U.S. 86, 97 (1993). Our Circuit has already applied *Porter* retroactively,

see Lawrence v. Goord, 304 F.3d 198, 200 (2d Cir. 2002) (per curiam), and we see no reason to not do so here.

VI. Hope v. Pelzer.

Finally, the plaintiffs' claim that *Hope v. Pelzer,* 536 U.S. 730 (2002), requires reversal here is baseless. In *Hope,* as we have already noted, the Supreme Court found that Alabama's practice of shackling prisoners to hitching posts as a disciplinary measure violated the Eighth Amendment. The case had nothing to do with the adequacy of pleadings in an action challenging prison conditions.[2]

CONCLUSION

Each incident alleged by the plaintiffs involves grave allegations of rights violations either perpetrated or tolerated by DOCS officials. In affirming the district court's dismissal of the second amended complaint, we take pains to assert that we are not establishing the triumph of form over substance. Rather, our affirmance should stand for the proposition that *form matters* in our system of adjudication. It matters because it is conducive to the coherent presentation of a plaintiff's claims, to the allowance of a fair opportunity to defendants to challenge those claims, and to the provision of appropriate relief. In sum, a proper attention to form is a prerequisite to the fair and efficient vindication of rights.

---

[2] We also hold that the district court did not abuse its discretion in declining to exercise supplemental jurisdiction over the plaintiffs' state law claims. *See Ametex Fabrics, Inc. v. Just In Materials, Inc.,* 140 F.3d 101, 105-06 (2d Cir. 1998).

The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNI **Filed: October 16, 2003**
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the city of New York, on the sixteenth day of October two thousand three.

Webb

Plaintiffs-Appellants,

Dkt No: 02-97 (L); 02-0233

v

Goord

Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Michael Webb.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no

such judge has requested that a vote be taken thereon.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

By:_____s/_____
Laura Bass Penn
Motions Staff Attorney

p o ccc
inbancdn_frm

§ 3626. Appropriate remedies with respect to prison conditions

(a) Requirements for relief.—

(1) Prospective relief.—**(A)** Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless–

(i) Federal law requires such relief to be ordered in violation of State or local law;

(ii) the relief is necessary to correct the violation of a Federal right; and

(iii) no other relief will correct the violation of the Federal right.

(C) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

(2) Preliminary injunctive relief.—In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary

injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief. Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.

(3) Prisoner release order.—(A) In any civil action with respect to prison condition, no court shall enter a prisoner release order unless–

(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and

(ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

(B) In any civil action in Federal court with respect to prison condition, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison c onditions is pending who believes that a prison release order should be considered may sua sponte

request the convening of a three-judge court to determine whether a prisoner release order should be entered.

(E) The three-judge court shall enter a prisoner release order only in the court finds by clear and convincing evidence that–

(i) crowding is the primary cause of the violation of a Federal aright; and

(ii) no other relief will remedy the violation of the Federal aright.

(F) Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release orders shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene

(b) Termination of relief.—

(1) Termination of prospective relief.—(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener—

(i) 2 years after the date the court granted or approved the prospective relief;

(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

(iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.

(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is

terminated under subparagraph (A).

(2) Immediate termination of prospective relief.–In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

(3) Limitation.–Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

(4) Termination or modification of relief.–Nothing in this section shall prevent any party or intervener from seeking modification or termination before the relief is terminable under paragraph (1) or (2), to the extent that modification or termination would otherwise be legally permissible.

(c) Settlements.–

(1) Consent decrees.–In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).

(2) Private settlement agreements.–(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

(B) Nothing in this se ction shall preclude any party

claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

(d) State law remedies.–The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.

(e) Procedure for motions affecting prospective relief.–

(1) Generally.–The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions. Mandamus shall lie to remedy any failure to issue a prompt ruling on such a motion.

(2) Automatic stay.–Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period–

(A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or

(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and

(B) ending on the date the court enters a final order ruling on the motion.

(3) Postponement or automatic stay.–The court may postpone the effective date of an automatic stay specified in subsection (e)(2)(A) for not more than 60 days for good cause. No postponement shall be permissible because of general congestion of the court's calendar.

(4) Other blocking the automatic stay.–Any order staying, suspending, delaying, or barring the operation of the automatic stay described in paragraph (2) (other than an order to postpone the effective date of the automatic stay under paragraph (3)) shall be treated as an order refusing to dissolve or modify an injunction and shall be appealable pursuant to

section 1292(a)(1) of title 28, United States Code, regardless of how the order is styled or whether the order is termed a preliminary or a final ruling.

(f) Special masters.–

(1) In general.–(A) In any civil action in a Federal court with respect to prison conditions, the court may appoint a special master who shall be disinterested and objective and who will give due regard to the public safety, to conduct hearings on the record and prepare proposed findings of fact.

(B) The court shall appoint a special master under this subsection during the remedial phase of the action only upon a finding that the remedial phase will be sufficiently complex to warrant the appointment.

(2) Appointment.–(A) If the court determines that the appointment of a special master is necessary, the court shall request that the defendant institution and the plaintiff each submit a list of not more than 5 persons to serve as a special master.

(B) Each party shall have the opportunity to remove up to 3 persons from the opposing party's list.

(C) The court shall select the master from the persons remaining on the list after the operation of subparagraph (B).

(3) Interlocutory appeal.–Any party shall have the right to an interlocutory appeal of the judge's selection of the special master under this subsection, on the ground of partiality.

(4) Compensation.–The compensation to be allowed to a special master under this section shall be based on an hourly rate not greater than the hourly rate established under section 3006A for payment of court-appointed counsel, plus costs reasonably incurred by the special master. Such compensation

and costs shall be paid with funds appropriated to the Judiciary.

(5) Regular review of appointment.–In any civil action with respect to prison conditions in which a special master is appointed under this subsection, the court shall review the appointment of the special master every 6 months to determine whether the services of the special master continue to be required under paragraph (1). In no event shall the appointment of a special master extend beyond the termination of the relief.

(6) Limitations on powers and duties.–A special master appointed under this subsection–

(A) may be authorized by a court to conduct hearings and prepare proposed findings of fact, which shall be made on the record;

(B) shall not make any findings or communications ex parte;

(C) may be authorized by a court to assist in the development of remedial plans; and

(D) may be removed at any time, but shall be relieved of the appointment upon the termination of relief.

(g) Definitions.–As used in this section–

(1) the term "consent decree" means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements;

(2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in

prison;

(3) the term "prisoner" means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

(4) the term "prisoner release order" includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or non-admission of prisoners to a prison;

(5) the term "prison" means any Federal State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;

(6) the term "private settlement agreement" means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled;

(7) the term "prospective relief" means all relief other than compensatory monetary damages;

(8) the term "special master" means any person appointed by a Federal court pursuant to Rule 53 of the Federal Rules of Civil Procedure or pursuant to powers of a master, regardless of the title or description given by the court; and

(9) the term "relief" means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements.